



State of Wisconsin

2017 - 2018 LEGISLATURE

LRB-6075/1
JK/ZDW/EVM:all

2017 BILL

1 AN ACT **to repeal** 20.395 (2) (fq); **to renumber and amend** 71.07 (7) (b) and
2 71.365 (1); **to amend** 71.05 (6) (a) 14., 71.07 (7) (c), 71.36 (1), 73.03 (71) and
3 77.51 (13g) (intro.); **to create** 71.05 (10) (dm), 71.07 (7) (b) 3., 71.21 (6), 71.365
4 (1) (b), 71.365 (4m), 71.775 (3) (a) 4., 73.03 (71) (d), 77.51 (18gm), 84.54 and
5 86.51 of the statutes; and **to affect** 2017 Wisconsin Act 59, section 9145 (4w);
6 **relating to:** state and local highway projects; expenditure of transportation
7 moneys received from the federal government; determining a reduction in
8 individual income tax rates; and election of pass-through entities to be taxed
9 at the entity level.

Analysis by the Legislative Reference Bureau

1.

This bill provides that for Southeast Wisconsin freeway megaprojects, major highway development projects, and certain state highway rehabilitation projects for which the Department of Transportation spends federal money, federal money must make up at least 70 percent of the aggregate funding for those projects. The bill provides that if DOT determines that it cannot meet this requirement or that it can make more effective and efficient use of federal money, DOT may submit a proposed

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alternate funding plan to the Joint Committee on Finance for review under its passive review procedure.

The bill requires DOT to notify political subdivisions receiving aid for local projects whether the aid includes federal moneys and how those moneys must be spent. The bill provides that, for projects that receive no federal money and that are reviewed and approved by a professional engineer or the county highway commissioner, DOT may not require political subdivisions to comply with any portion of DOT's facilities development manual other than design standards.

2.

Under current law, DOT may make transfers of state and federal funding between highway programs. This bill eliminates this authority.

This bill eliminates the special approval process for the second category of major highway projects. Under this bill, these projects must be approved using the process provided for the first category of major highway projects.

3.

Under current law, the Department of Revenue must determine the amount of additional revenue collected from the state sales and use tax as a result of any federal law that expands the state's authority to collect sales and use taxes from out-of-state retailers. After DOR makes that determination, it must then determine how much the individual income tax rates may be reduced in the following taxable year in order to decrease individual income tax revenue by the amount of additional sales and use tax revenue. Finally, DOR must certify its determinations to the secretary of administration, to the governor, and to the legislature and specify that the new individual income tax rates will take effect in the following year. No further legislation is required to make this change.

The U.S. Supreme Court recently upheld a South Dakota law that required the collection of state sales and use taxes from any out-of-state seller that either conducts 200 or more transactions annually with consumers in the state or has annual sales in the state exceeding \$100,000. See, *South Dakota v. Wayfair, Inc.*, 585 U.S. ____ (2018). The *Wayfair* decision overturned longstanding precedent that prevented a state from collecting sales and use tax from out-of-state sellers that did not have a physical presence in the state. See, *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

This bill clarifies that the recent U.S. Supreme Court decision that expands a state's authority to collect sales and use taxes from out-of-state retailers triggers the determinations mentioned above. The bill also provides that the new individual income tax rates based on the determinations would not take effect automatically in the year following DOR's certification, but, instead, the Department of Administration, in consultation with DOR, would determine the new tax rates to take effect for the taxable year ending on December 31, 2019, and report its determinations to the governor, JCF, and the Legislative Audit Bureau. LAB would then review the determinations and report its findings to JCF and the Joint Legislative Audit Committee. If LAB's review results in a re-determination of the rates, JCF would determine which rates apply to the taxable year ending on December 31, 2019, and report its determination to the governor, the secretary of

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administration, and the secretary of revenue. Finally, the bill includes in the definition of a “retailer engaged in business in this state” any retailer that has annual gross sales into this state in excess of \$100,000 or an annual number of separate sales transactions into this state of 200 or more.

4.

This bill allows pass-through entities to elect to be taxed at the entity level for purposes of the state’s income and franchise taxes.

Under current law, pass-through entities, such as tax-option corporations and partnerships, are generally not subject to the income or franchise tax at the entity level. Rather, any item of income, loss, or deduction flows through to their shareholders, partners, or members, who are then subject to tax.

The bill allows tax-option corporations and partnerships, including limited liability companies and other entities that are treated as partnerships under federal tax law, to elect to be taxed at the entity level for purposes of the income and franchise taxes. An entity that makes the election is taxed at a rate of 7.9 percent on its net income that is reportable to Wisconsin, and the situs of income is determined as if the election was not made. The entity may not claim losses and tax credits except for the credit for taxes paid to other states. The bill also provides that the adjusted basis of the entity’s partners, shareholders, or members is determined as if the election was not made. If the entity fails to pay the taxes due, DOR may collect the amount from the entity’s partners, shareholders, or members. Persons who hold more than 50 percent ownership of the pass-through entity must consent to the election and must consent to any revocation of the election. The bill allows the election to be made for taxable years beginning in 2018 for tax-option corporations and 2019 for other entities.

For further information see the **state and local** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 20.395 (2) (fq) of the statutes is repealed.

2 **SECTION 2.** 71.05 (6) (a) 14. of the statutes is amended to read:

3 71.05 (6) (a) 14. Any amount received as a proportionate share of the earnings
4 and profits of a corporation that is an S corporation for federal income tax purposes
5 if those earnings and profits accumulated during a year for which the shareholders
6 have elected under s. 71.365 (4) (a) not to be a tax-option corporation, to the extent
7 not included in federal adjusted gross income for the current year. This subdivision

1 does not apply to earnings and profits accumulated during a year for which a
2 tax-option corporation has made an election under s. 71.365 (4m) (a) to be taxed at
3 the entity level.

4 **SECTION 3.** 71.05 (10) (dm) of the statutes is created to read:

5 **71.05 (10) (dm)** Any item of income, loss, or deduction passed through from an
6 entity that has made an election under s. 71.21 (6) (a) or 71.365 (4m) (a) to be taxed
7 at the entity level.

8 **SECTION 4.** 71.07 (7) (b) of the statutes, as affected by 2017 Wisconsin Act 59,
9 is renumbered 71.07 (7) (b) 1. and amended to read:

10 **71.07 (7) (b) 1.** Subject to conditions and limitations in pars. (c) and (d), if a
11 resident individual, estate or trust pays a net income tax to another state, that
12 resident individual, estate or trust may credit the net tax paid to that other state on
13 that income against the net income tax otherwise payable to the this state on income
14 of the same year. The credit may not be allowed unless the income taxed by the other
15 state is also considered income for Wisconsin tax purposes. The credit may not be
16 allowed unless claimed within the time provided in s. 71.75 (2), but s. 71.75 (4) does
17 not apply to those credits. For purposes of this paragraph subdivision, amounts
18 declared and paid under the income tax law of another state are considered a net
19 income tax paid to that other state only in the year in which the income tax return
20 for that state was required to be filed.

21 2. Income and franchise taxes paid to another state by a tax-option corporation,
22 partnership, or limited liability company that is treated as a partnership may be
23 claimed as a credit under this paragraph by that corporation's shareholders, that
24 partnership's partners, or that limited liability company's members who are
25 residents of this state and who otherwise qualify under this paragraph, unless the

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1 tax-option corporation, partnership, or limited liability company has made an
2 election under s. 71.21 (6) (a) or 71.365 (4m) (a).

3 **SECTION 5.** 71.07 (7) (b) 3. of the statutes is created to read:

4 **71.07 (7) (b) 3.** Subject to the conditions and limitations in pars. (c) and (d), if
5 a tax-option corporation, partnership, or limited liability company makes an
6 election under s. 71.21 (6) (a) or 71.365 (4m) (a), that tax-option corporation,
7 partnership, or limited liability company may credit the net income or franchise tax
8 paid by the entity to another state on that income and the net income tax on that
9 income paid by the entity on behalf of its shareholders, partners, and members that
10 are residents of this state on a composite return filed with the other state against the
11 net income or franchise tax otherwise payable to this state on income of the same
12 year. The credit may not be allowed unless the income taxed by the other state is also
13 considered income for Wisconsin tax purposes and is otherwise attributable to
14 amounts that would be reportable to this state by shareholders, partners, or
15 members of the tax-option corporation, partnership, or limited liability company
16 that are residents of this state if the election under s. 71.21 (6) (a) or 71.365 (4m) (a)
17 was not made. The credit may not be allowed unless claimed within the time
18 provided in s. 71.75 (2), but s. 71.75 (4) does not apply to those credits. For purposes
19 of this subdivision, amounts declared and paid under the income tax law of another
20 state are considered a net income tax paid to that other state only in the year in which
21 the income tax return for that state was required to be filed.

22 **SECTION 6.** 71.07 (7) (c) of the statutes, as created by 2017 Wisconsin Act 59,
23 is amended to read:

24 **71.07 (7) (c)** The credit total credits under par. (b) 1. and 2. may not exceed an
25 amount determined by multiplying the taxpayer's net Wisconsin income tax by a

ratio derived by dividing the income subject to tax in the other state that is also subject to tax in Wisconsin while the taxpayer is a resident of Wisconsin, by the taxpayer's Wisconsin adjusted gross income. The credit under par. (b) 3. may not exceed an amount determined by multiplying the income subject to tax in the other state that is also subject to tax in Wisconsin by 7.9 percent.

SECTION 7. 71.21 (6) of the statutes is created to read:

71.21 (6) (a) If persons who, on the day on which an election under this paragraph is made, hold more than 50 percent of the capital and profits of a partnership consent, a partnership that is a partnership for federal income tax purposes may elect, on or before the due date or extended due date of its return under this chapter, to be taxed at the entity level at a rate of 7.9 percent of net income reportable to this state as described in par. (d) 1. for that taxable year.

(b) It is the intent of the election under par. (a) that partners of a partnership may not include in their Wisconsin adjusted gross income their proportionate share of all items of income, gain, loss, or deduction of the partnership. It is also the intent that the partnership shall pay tax on items that would otherwise be taxed if this election was not made.

(c) If persons who, on the day on which the election under this paragraph is made, hold more than 50 percent of the capital and profits of a partnership that has elected to be taxed at the entity level under par. (a) consent, a partnership that is a partnership for federal income tax purposes may elect, on or before the due date or extended due date of its return under this chapter, to revoke for that taxable year its election under par. (a).

(d) If an election is made under par. (a), all of the following apply:

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1 1. The net income of the partnership is computed under subs. (1) to (5) and the
2 situs of income shall be determined as if the election under par. (a) was not made.

3 2. The partnership may not claim the loss under s. 71.05 (8).

4 3. Except as provided in s. 71.07 (7) (b) 3., the tax credits under this chapter
5 may not be claimed by the partnership.

6 4. A partner's adjusted basis of the partner's interest in the partnership is
7 determined as if the election under par. (a) was not made.

8 5. The provisions of ss. 71.09 and 71.84 relating to estimated payments and
9 underpayment interest shall apply to the partnership.

10 6. If the partnership fails to pay the amount owed to the department with
11 respect to income as a result of the election under par. (a), the department may collect
12 the amount from the partners based on their proportionate share of such income.

13 (e) The department may promulgate rules to implement this subsection.

14 **SECTION 8.** 71.36 (1) of the statutes is amended to read:

15 71.36 (1) It is the intent of this section that shareholders of tax-option
16 corporations include in their Wisconsin adjusted gross income their proportionate
17 share of the corporation's tax-option items unless the corporation elects under s.
18 71.365 (4) (a) not to be a tax-option corporation or elects under s. 71.365 (4m) (a) to
19 be taxed at the entity level.

20 **SECTION 9.** 71.365 (1) of the statutes is renumbered 71.365 (1) (a) and amended
21 to read:

22 71.365 (1) (a) For purposes of this chapter, the adjusted basis of a shareholder
23 in the stock and indebtedness of a tax-option corporation shall be determined in the
24 manner prescribed by the internal revenue code for a shareholder of an S
25 corporation, except that the nature and amount of items affecting that basis shall be

1 determined under this chapter. This subsection paragraph does not apply to 1978
2 and earlier taxable years of corporations which were S corporations for federal
3 income tax purposes or to taxable years of corporations for which an election has been
4 made under sub. (4) (a).

5 **SECTION 10.** 71.365 (1) (b) of the statutes is created to read:

6 71.365 (1) (b) The adjusted basis of a shareholder in the stock and indebtedness
7 of a tax-option corporation that has made an election under sub. (4m) (a) is
8 determined as if the election was not made.

9 **SECTION 11.** 71.365 (4m) of the statutes is created to read:

10 71.365 (4m) TAX-OPTION CORPORATION ELECTION TO PAY FRANCHISE OR INCOME TAX
11 AT THE ENTITY LEVEL. (a) If persons who hold more than 50 percent of the shares on
12 the day on which an election under this paragraph is made consent, a corporation
13 that is an S corporation for federal income tax purposes may elect, on or before the
14 due date or extended due date of its return under this chapter, to be taxed at the
15 entity level at a rate of 7.9 percent of net income reportable to this state as described
16 in par. (d) 1. for that taxable year.

17 (b) It is the intent of the election under par. (a) that shareholders of a tax-option
18 corporation may not include in their Wisconsin adjusted gross income their
19 proportionate share of all items of income, gain, loss, or deduction of the tax-option
20 corporation. It is also the intent that the tax-option corporation shall pay tax on
21 items that would otherwise be taxed if this election was not made.

22 (c) If persons who, on the day on which the election under this paragraph is
23 made, hold more than 50 percent of the shares of a corporation that has elected to
24 be taxed at the entity level under par. (a) consent, a corporation that is an S
25 corporation for federal income tax purposes may elect, on or before the due date or

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1 extended due date of its return under this chapter, to revoke for that taxable year its
2 election under par. (a).

3 (d) If an election is made under par. (a), all of the following apply:

4 1. The net income of the tax-option corporation is computed under s. 71.34 (1k)
5 and the situs of income shall be determined as if the election was not made.

6 2. Except as provided in s. 71.07 (7) (b) 3., the tax credits under this chapter
7 may not be claimed by the tax-option corporation.

8 3. The tax-option corporation may not claim losses under ss. 71.05 (8) and
9 71.26 (4).

10 4. The provisions of ss. 71.29 and 71.84 relating to estimated payments and
11 underpayment interest shall apply to the tax-option corporation for the taxable year
12 beginning in 2019 and later years.

13 5. If the tax-option corporation fails to pay the amount owed to the department
14 with respect to income as a result of the election under par. (a), the department may
15 collect such amount from the shareholders based on their proportionate share of such
16 income.

17 (e) The department may promulgate rules to implement this subsection.

18 **SECTION 12.** 71.775 (3) (a) 4. of the statutes is created to read:

19 71.775 (3) (a) 4. The pass-through entity has elected under s. 71.21 (6) (a) or
20 71.365 (4m) (a) to be taxed at the entity level.

21 **SECTION 13.** 73.03 (71) of the statutes is amended to read:

22 73.03 (71) (a) To determine the amount of additional revenue that reported to
23 the department ~~collected~~ from the taxes imposed under subch. III of ch. 77 as a result
24 of ~~any federal law to expand the United States Supreme Court decision that expands~~
25 the state's authority to require out-of-state retailers to collect and remit the taxes

1 imposed under subch. III of ch. 77 on purchases by Wisconsin residents during the
2 ~~first 12 months following the date on which the department begins collecting the~~
3 ~~additional revenue as a result of a change in federal law period beginning on October~~
4 ~~1, 2018, and ending on September 30, 2019.~~

5 (b) After the department makes the determination under par. (a), the
6 department of administration, in consultation with the department of revenue, shall
7 determine how much the individual income tax rates under s. 71.06 may be reduced
8 ~~in the following for the taxable year ending on December 31, 2019,~~ in order to
9 decrease individual income tax revenue by the amount determined under par. (a).
10 For purposes of this paragraph, the department shall calculate the tax rate
11 reductions shall be calculated in proportion to the share of gross tax attributable to
12 each of the tax brackets under s. 71.06 in effect during the most recently completed
13 taxable year.

14 (c) ~~The department No later than October 20, 2019, the secretary of~~
15 administration shall certify and report the determinations made under pars. (a) and
16 (b) ~~to the secretary of the department of administration, to the governor, and to the~~
17 legislature the joint committee on finance, and the legislative audit bureau and
18 specify with that certification and report that the new tax rates take effect in for the
19 taxable year following the taxable year in which the department makes the
20 certification under this paragraph ending on December 31, 2019, subject to par. (d).

21 **SECTION 14.** 73.03 (71) (d) of the statutes is created to read:

22 73.03 (71) (d) The legislative audit bureau shall review the determinations
23 reported under par. (c) and report its findings to the joint legislative audit committee
24 and the joint committee on finance no later than November 1, 2019. If the legislative
25 audit bureau's review of the determinations reported under par. (c) results in a

1 different calculation of the tax rates than that made under par. (b), the joint
2 committee on finance shall determine which tax rates to apply to the taxable year
3 ending on December 31, 2019, and report its determination to the governor, the
4 secretary of administration, and the secretary of revenue no later than November 10,
5 2019.

6 **SECTION 15.** 77.51 (13g) (intro.) of the statutes is amended to read:

7 77.51 (13g) (intro.) Except as provided in sub. subs. (13gm) and (13h), “retailer
8 engaged in business in this state”, for purposes of the use tax, includes any of the
9 following:

10 **SECTION 16.** 77.51 (13gm) of the statutes is created to read:

11 77.51 (13gm) (a) “Retailer engaged in business in this state” does not include
12 a retailer who has no activities as described in sub. (13g), except for activities
13 described in sub. (13g) (c), unless the retailer meets either of the following criteria
14 in the previous year or current year:

15 1. The retailer’s annual gross sales into this state exceed \$100,000.
16 2. The retailer’s annual number of separate sales transactions into this state
17 is 200 or more.

18 (b) If an out-of-state retailer’s annual gross sales into this state exceed
19 \$100,000 in the previous year or the retailer’s annual number of separate sales
20 transactions into this state is 200 or more in the previous year, the retailer shall
21 register with the department and collect the taxes administered under s. 77.52 or
22 77.53 on sales sourced to this state under s. 77.522 for the entire current year.

23 (c) If an out-of-state retailer’s annual gross sales into this state are \$100,000
24 or less in the previous year and the retailer’s annual number of separate sales
25 transactions into this state is less than 200 in the previous year, the retailer is not

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1 required to register with the department and collect the taxes administered under
2 s. 77.52 or 77.53 on sales sourced to this state under s. 77.522 until the retailer's sales
3 or transactions meet the criteria in par. (a) 1. or 2. for the current year, at which time
4 the retailer shall register with the department and collect the tax for the remainder
5 of the current year.

6 (d) All of the following apply for purposes of this subsection:

7 1. "Year" means the retailer's taxable year for federal income tax purposes.

8 2. The annual amounts described in this subsection include both taxable and
9 nontaxable sales.

10 3. Each required periodic payment of a lease or license is a separate sales
11 transaction.

12 4. Deposits made in advance of a sale are not sales transactions.

13 5. An out-of-state retailer's annual amounts include all sales into this state
14 by the retailer on behalf of other persons and all sales into this state by another
15 person on the retailer's behalf.

16 **SECTION 17.** 84.54 of the statutes is created to read:

84.54 Minimum federal expenditures for projects receiving federal

17 **funding.** (1) Except as provided in sub. (2), for all of the following projects on which
18 the department expends federal moneys, the department shall expend federal
19 moneys on not less than 70 percent of the aggregate project components eligible for
20 federal funding each fiscal year:

21 (a) Southeast Wisconsin freeway megaprojects.

22 (b) Major highway development projects.

23 (c) State highway rehabilitation projects with a total cost of less than \$10
24 million.

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1 **(2)** If the department determines that it cannot meet the requirements under
2 sub. (1) or that it can make more effective and efficient use of federal moneys than
3 the use required under sub. (1), the department may submit a proposed alternate
4 funding plan to the joint committee on finance. If the cochairpersons of the
5 committee do not notify the department within 14 working days after the date of the
6 department's submittal that the committee has scheduled a meeting for the purpose
7 of reviewing the proposed plan, the department may expend moneys as proposed in
8 the plan. If, within 14 working days after the date of the submittal, the
9 cochairpersons of the committee notify the department that the committee has
10 scheduled a meeting for the purpose of reviewing the proposed plan, the department
11 may expend moneys as proposed in the plan only upon approval of the committee.
12 The department may continue with any projects subject to the funding requirement
13 under sub. (1) while the committee conducts its review, including any hearings
14 conducted by the committee.

15 **SECTION 18.** 86.51 of the statutes is created to read:

16 **86.51 Requirements for local projects.** (1) In this section:

17 (a) "Local bridge" means a bridge that is not on the state trunk highway system
18 or on marked routes of the state trunk highway system designated as connecting
19 highways.

20 (b) "Local roads" means streets under the authority of cities or villages, county
21 trunk highways, or town roads.

22 (c) "Political subdivision" means a county, city, village, or town.

23 (d) "Project" means the development, construction, repair, or improvement of
24 a local road or a local bridge.

1 **(2)** If the department disburses aid to a political subdivision for a project, the
2 department shall notify the political subdivision whether the aid includes federal
3 moneys and which project components must be paid for with federal moneys, if any.

4 **(3)** For any project meeting all of the following criteria, the department may
5 not require a political subdivision to comply with any portion of the department's
6 facilities development manual other than design standards:

7 (a) The project proposal is reviewed and approved by a professional engineer
8 or by the highway commissioner for the county in which the project will be located.

9 (b) The project is conducted by a political subdivision with no expenditure of
10 federal money.

11 **SECTION 19.** 2017 Wisconsin Act 59, section 9145 (4w) is repealed.

12 **SECTION 20. Nonstatutory provisions.**

13 **(1) INDIVIDUAL INCOME TAX RATES.** The secretary of administration shall exclude
14 from the calculation under s. 16.518 (2) all additional revenue deposited in the
15 general fund in the 2018-19 fiscal year that is attributable to an increase in the sales
16 and use taxes reported under s. 73.03 (71), as determined by the secretary of
17 administration in consultation with the department of revenue.

18 **SECTION 21. Initial applicability.**

19 **(1) PASS-THROUGH ENTITIES.** The treatment of ss. 71.05 (6) (a) 14. and (10) (dm),
20 71.07 (7) (c), 71.21 (6), 71.36 (1), 71.365 (4m), and 71.775 (3) (a) 4., the renumbering
21 and amendment of ss. 71.07 (7) (b) and 71.365 (1), and the creation of ss. 71.07 (7)
22 (b) 3. and 71.365 (1) (b) first apply to taxable years beginning on January 1, 2019,
23 except that the treatment of ss. 71.05 (6) (a) 14. and (10) (dm), 71.07 (7) (c), 71.21 (6),
24 71.36 (1), 71.365 (4m), and 71.775 (3) (a) 4., the renumbering and amendment of ss.
25 71.07 (7) (b) and 71.365 (1), and the creation of ss. 71.07 (7) (b) 3. and 71.365 (1) (b)

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1 first apply to taxable years beginning on January 1, 2018, for tax-option
2 corporations.

3 (2) REQUIREMENTS FOR HIGHWAY PROJECTS. The treatment of ss. 84.54 and 86.51
4 first applies to projects let and aid disbursed on the effective date of this subsection.

5 **SECTION 22. Effective dates.** This act takes effect on the day after publication,
6 except as follows:

7 (1) HIGHWAY FUNDING TRANSFERS. The treatment of s. 20.395 (2) (fq) and SECTION
8 19 of this act take effect on July 1, 2019.

9 (2) REQUIREMENTS FOR HIGHWAY PROJECTS. The treatment of ss. 84.54 and 86.51
10 and SECTION 21 (2) of this act take effect on July 1, 2019.

11 (END)